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MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-385
Civil

JOHN W. NORMAN, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT
United Transportation Union in Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-395
Civil

JOHN W. NORMAN, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT
United Transportation Union in Opposition

OPINIONS BELOW

The Court of Appeals Opinion is reported at 457 F2d 594. The opinion of the District Court is unreported. Both opinions appear in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether individual plaintiffs, retired Negro railroad employees whose appeal to the Court of Appeals was limited exclusively to the denial of increased retirement benefits which they are now receiving under the provisions of the Railroad Retirement Act, 45 USCA Sec. 228 et seq., who rejected the District Court's offer to submit factual data to sustain their claim of damages and have ignored the provisions of the Railroad Retirement Act, have raised issues justifying the exercise of jurisdiction by this Court.

STATUTORY PROVISIONS

Since retirement benefits in railroad employment are primarily governed by the Railroad Retirement Act, there is involved herein the provisions thereof applying to the retired petitioners:

45 USCA Sec. 228 c (a)(1)

> "(a) (1) The annuity of an individual shall be computed by multiplying his 'years of service' by the following percentages of his 'monthly compensation': 3.58 per centum of the first $50; 2.69 per centum of the next $100; and 1.79 per centum of the remainder up to a total of (i) $450, or (ii) an amount equal to one-twelfth of the current maximum and taxable 'wages' as defined in section 3121 of Title 26, whichever is greater.
>
> * * * * * * * *
>
> In computing the monthly compensation, no part of my month's compensation in excess of $300 for any month before July 1, 1954, or in excess of $350 for any month after June 30, 1954, and before June 1, 1959, or in excess of

$400 for any month after May 31, 1959, and before November 1, 1963, or in excess of $450 for any month after October 31, 1963, and before October 1, 1965, or in excess of (i) $450, or (ii) an amount equal to one-twelfth of the current maximum annual taxable 'wages' as defined in section 3121 of Title 26, whichever is greater, for any month after September 30, 1965, shall be recognized."

45 USCA Sec. 228 c (j) (i)

"An individual who is entitled to the payment of an annuity under Section 228b of this title (other than subsection (e) or (h) thereof) and had a current connection with the railroad industry at the time such annuity began to accrue, shall be entitled to have a supplemental annuity accrue to him for each month beginning with the month in which he has (i) attained the age of sixty-five and (ii) completed twenty-five or more years of service. The amount of the supplemental annuity shall be $45 plus an additional amount of $5 for each year of service that that individual has in excess of 25 years, but in no case shall the supplemental annuity exceed $70: * * *"

45 USCA Sec. 228 c (j) (ii)

"(2) The supplemental annuity provided by this subsection for an individual shall, with respect to any month, be reduced by the amount of the supplemental pension, attributable to the employer's contribution, that such individual is entitled to receive for that month under any other supplemental pension plan: *Provided, however,* That the maximum of such reduction shall be equal to the amount of the supplemental annuity less any amount by which the supplemental pension is reduced by reason of the supplemental annuity."

STATEMENT OF THE CASE

Following remand of this case to the District Court in Norman v. Missouri Pacific R Co., 414 F2d 23 (8th Cir. 1969), respondent Railroad filed a Third Party Complaint naming this respondent (UTU) as a third party defendant. Trial of the case was postponed pending disposition of the factually similar case of United States v. St.L.-San Francisco Railway Co., et al. (Frisco) which was then pending in the District Court for the Eastern District of Missouri and was further advanced in the adjudicatory processes.

Following the en banc decision of the Court of Appeals in Frisco, 464 F2d 301, cert. den. (409 US 1107) the parties here agreed to offer plaintiffs the identical relief ordered in that case, the petitioners agreeing that back pay was foreclosed by that decision. A judgment was entered pursuant to the agreement and petitioners thereafter appealed solely on the ground that additional retirement benefits were denied those petitioners who had then retired as train porters. The carrier in its Brief in Opposition has properly pointed out that Petitioners were afforded the opportunity to present factual data in the District Court to support their claim for increased retirement benefits but failed to do so.

In affirming the decision of the District Court, the Court of Appeals relied on its prior en banc decision in which back pay was denied. Omitted from petitioner's Statement of the Case is the fact that that result was independently dictated by the fact that the crafts of train porter and brakeman were in fact non-identical, that the experience of a train porter did not, per se, qualify him to be a brakeman, and that employment of train porters as brakemen was conditioned upon the train porters successfully qualifying for such employment through a training program which was subsequently implemented by a

decree of the District Court. This condition was in recognition of the fact that railroad operation is a high risk occupation involving the safety of the general public as well as operating employees.

REASONS FOR DENYING THE WRIT

Aside from the reasons advanced by Respondent railroad, with which this Respondent concurs, we submit two additional reasons, related to the Railroad Retirement Act, which Petitioners have chosen to ignore on the specious argument that the relief they seek is against their former employer rather than under the Railroad Retirement Act.

First: The petition is based on a false premise, stated on page 4 of the Petition "whether the seven plaintiffs who had retired as porters while the litigation was pending were entitled to an upward increase in their retirement pay comparable to what they would be receiving had they retired as brakemen."

This premise assumes falsely that retirement benefits under the Railroad Retirement Act are directly related to the classification of the retired employee. Section 45 USCA (c)(a)(1) dispels this myth by providing the formula for retirement benefits, based solely on monthly compensation with heavy emphasis on the lower spectrum of the pay scale (and modest ceilings), with years of service as a multiplier. Thus, a lower paid employee may very well, and may very probably, receive a retirement annuity at least equal to a retired employee who had worked in a different classification at a higher rate of pay.

Second: The provisions of Section 228 c (j)(i) of the Railroad Retirement Act providing for supplemental annuities to retirees with twenty-five or more years of service (which includes all of the petitioners), and the limitations on this supplemental an-

nuity imposed by section 228 c (j)(ii) have been totally ignored by petitioners. The effect of these statutory provisions would wipe out any benefits which petitioners could conceivably gain by the result they seek, which would simply substitute a private annuity for the statutory supplement and which would thus be self defeating.

In response to the Petitioners Petition we believe it pertinent to point out that they have not recognized the problems raised by the Railroad Retirement Act, they have ignored invitations by the District Court to submit factual support of their claim, and the Petition should be denied.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted

CHARLES R. JUDGE

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